Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of	)	
Joint Application by SBC Communications Inc. Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Arkansas and Missouri	)	**CC Docket No. 01-194**

OPPOSITION
OF THE
ASSOCIATION OF COMMUNICATIONS ENTERPRISES

ASSOCIATION OF COMMUNICATIONS ENTERPRISES
Charles C. Hunter
Catherine M. Hannan
HUNTER COMMUNICATIONS LAW GROUP
1620 I Street, N.W.
Suite 701
Washington, D.C. 20006
(202) 293-2500

September 10, 2001 **Its Attorneys**

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SUMMARY

The Association of Communications Enterprises ("ASCENT"), a national trade association representing smaller providers of competitive telecommunications and information services hereby urges the Commission to deny as premature the Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance (collectively "SWBT") for authority to provide in-region, interLATA service in the States of Arkansas and Missouri, pursuant to Section 271 of the Communications Act of 1934. As ASCENT will demonstrate herein:

- SWBT continues to impose unreasonable, and hence unlawful, restrictions on the resale of xDSL-based advanced services, thereby "severely hinder[ing] the ability of other carriers to compete."

- SWBT has failed to adequately address the concerns identified by the U.S. Department of Justice regarding its pricing of unbundled network elements in Missouri, and as a result continues to levy inflated charges for access to such elements.

Given that failure by SWBT to "satisf[y] an individual checklist item of the competitive checklist constitutes [an] independent ground[] for denying . . . [its] application," the Commission should not, indeed cannot, grant SWBT the authority it seeks here unless and until each of these flaws has been fully rectified. Moreover, the Commission should not, indeed cannot, grant SWBT additional in-region, interLATA authority until such time as it has concluded its investigation of the carrier's submission of false and misleading information in support of its Kansas/Oklahoma Section 271 application.

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OPPOSITION OF THE ASSOCIATION OF COMMUNICATIONS ENTERPRISES

The Association of Communications Enterprises (ASCENT"),[1] through undersigned counsel and pursuant to Public Notice, DA 01-1486 (released June 21, 2001), hereby opposes the joint application ("Application") filed by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance (collectively "SWBT") for authority to provide in-region, interLATA service in the States of Arkansas and Missouri, pursuant to Section 271 of the Communications Act of 1934 (the "Act"), as amended by the Telecommunications Act of 1996.[2] As ASCENT will demonstrate herein,

[1] ASCENT is a national trade association representing smaller providers of competitive telecommunications and information services. ASCENT was created, and carries a continuing mandate, to foster and promote the competitive provision of telecommunications and information services, to support the competitive communications industry, and to protect and further the interests of entities engaged in the competitive provision of telecommunications and information services. ASCENT is the largest association of competitive carriers in the United States, numbering among its members not only the large majority of providers of domestic interexchange and international services, but the majority of competitive local exchange carriers, as well.

[2] 47 U.S.C. § 271.

Verizon has not satisfied "the ultimate burden of proof that its application satisfies all of the requirements of section 271."[3] Because Verizon has, therefore, not "take[n] the steps required to open its [Arkansas and Missouri] local markets to full competition," it should not "be rewarded with section 271 authority to enter the long distance market" in either Arkansas or Missouri.[4]

3. SWBT Imposes Unreasonable Restrictions on
The Resale of xDSL-based Advanced Services

[3] Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York (Memorandum Opinion and Order), 15 FCC Rcd. 3953, ¶ 44 (1999) (*subsequent history omitted*).

[4] Id. at ¶ 15.

Section 251(c)(4) of the Act not only requires incumbent local exchange carriers ("LECs") "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers," but prohibits incumbent LECs from "impos[ing] unreasonable or discriminatory conditions or limitations on the resale of such telecommunications service."[5] As the Commission long ago recognized, "the ability of incumbent LECs to impose resale restrictions and conditions is likely to be evidence of market power and may reflect an attempt by incumbent LECs to preserve their market position."[6] Undoubtedly for this reason, Congress expressly precluded the Commission from granting an application for in-region, interLATA authority until it had first determined that the applying carrier was, among other things, making available its "[t]elecommunications services . . . for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3)."[7] Acknowledging this restriction, the Commission, recognizing that failure to "satisf[y] an individual checklist item of the competitive checklist constitute[d an] independent ground[] for denying . . . [an] application," has

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[5] 47 U.S.C. § 251(c)(4).

[6] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499, ¶ 939 (1996) (*subsequent history omitted*).

[7] 47 U.S.C. §§ 271(c)(2)(B), 271(d)(3).

held that a carrier's imposition of unreasonable restrictions on the resale of its telecommunications services "renders . . . [its] application deficient."[8]

[8] Application of Bell South Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana (Memorandum Opinion and Order), 13 FCC Rcd. 20599, ¶ 50 (1998) (*subsequent history omitted*); Application of Bell South Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended , to Provide In-Region, InterLATA Services in Louisiana (Memorandum Opinion and Order), 13 FCC Rcd. 6245, ¶ 63 fn. 225 (1998) (*subsequent history omitted*).

In its Application, SWBT concedes that it does not make available for Section 251(c)(4) resale many of the xDSL-based advanced services provided by its advanced services affiliate -- Advanced Solutions, Inc. ("ASI").[9] SWBT acknowledges that the Act mandates 251(c)(4) resale xDSL-based advanced services.[10] The carrier further recognizes that it may not lawfully use the artifice of a separate affiliate to avoid its 251(c)(4) resale obligations as they relate to xDSL-based advanced services.[11] Undaunted, however, SWBT contends that it may avoid its 251(c)(4) resale obligations as they relate to xDSL-based advanced services by bundling those services with Internet access, and by unilaterally converting an existing "retail" service into a "wholesale" service, each with the specific intent of denying competitors the ability to resell xDSL-based advanced services. In short, it is SWBT's position that it can lawfully manipulate its provision of xDSL-based advanced services in order to avoid its Section 251(c)(4) resale obligations.

SWBT makes no effort to disguise its efforts to thwart the Congressional mandate embodied in Section 251(c)(4) of the Act through blatant manipulation of its product offerings. SWBT, for example, effectively concedes that it had been providing xDSL-based advanced services directly to residential and small business end users in conjunction with Internet service providers ("ISPs"), acknowledging that it was billing end-users directly for the service and touting its xDSL-based advanced services offering on its web site.[12] When called to task for not providing for Section

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[9] Brief in Support of Joint Application at 50.

[10] Id. at 48 - 49.

[11] Id. at 49.

[12] Id. at 57 - 58.

251(c)(4) resale of these services, SWBT's response has not been to honor its statutory resale obligations; rather the carrier has moved to "eliminate[] the so-called "split billing option" and to "convert existing split-billed accounts to consolidated billing," and to modify its marketing of xDSL-based advanced services.[13] But, realizing the value in a xDSL-based advanced services offering provided directly to end-users, SWBT has continued to offer the service, but has bundled it with Internet access and refused to make it available for Section 251(c)(4) resale on the grounds that it has been transformed into an "information service."[14]

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[13] Id.

[14] Id. at 58 - 63.

SWBT's current machinations represent yet another chapter in the sorry history of xDSL-based advanced services resale, or more precisely the lack of xDSL-based advanced services resale. It is approaching six years since the enactment of the Telecommunications Act of 1996 and SWBT has yet to provide for the meaningful resale of xDSL-based advanced services. Initially, SWBT sought to avoid its Section 251(c)(4) resale obligations as they relate to xDSL-based advanced services by claiming that such services were "exchange access," and therefore, not subject to the statutory discounted resale obligation.[15] When the Commission rejected this excuse,[16] the carrier tried to insulate itself from its Section 251(c)(4) resale obligations as they relate to xDSL-based advanced services by providing such services through exclusively through a wholly-owned and controlled affiliate. When the U.S. Court of Appeals for the District of Columbia held this stratagem to be unlawful,[17] SWBT sought to dress its "retail" offerings of xDSL-based advanced services up as "wholesale" services, but, as noted above, the carrier not only failed to do so, but realized that offering xDSL-based advanced services directly to end users was good business. Accordingly, SWBT has now both attempted to eliminate the retail components of its "wholesale" offering, but has concocted a scheme by which it believes it can offer xDSL-based advanced

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[15] In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Services (Memorandum Opinion and Order), 13 FCC Rcd. 24011 (1998) (*subsequent history omitted*).

[16] In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Services (Second Report and Order), 14 FCC Rcd. 19237, ¶ 8 (1999) (*subsequent history omitted*).

[17] Association of Communications Enterprises v. FCC, 235 F.3d 662 (D.C. Cir. 2001).

services at retail without fulfilling its Section 251(c)(4) obligations with respect to those services. Enough is enough!

The Commission has already held that an incumbent LEC may not twist and contort the agency's pro-competitive initiatives for the purpose of hindering competition. Thus, the Commission squarely rejected Verizon's attempt to use the agency's pro-competitive line-sharing mandate to avoid its Section 251(c)(4) resale obligations as they relate to xDSL-based advanced services.[18] Characterizing Verizon's position "as based on a misapplication of this Commission's line sharing rules," the Commission took Verizon to task for distorting the agency's line sharing mandate to "severely hinder[] the ability of other carriers to compete."[19]

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[18] Application of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Service in Connecticut (Memorandum Opinion and Order), CC Docket No. 01-100, FCC 01-208, ¶ 31 (July 20, 2001).

[19] Id. at ¶¶ 31 - 32.

Unlike Verizon, SWBT here distorts not one, but two, of the Commission's pro-competitive initiatives in its effort to achieve an anti-competitive end. The first of the carrier's stratagems involve the Commission's effort to "stimulate the development and deployment of broadband services to residential markets in furtherance of the Commission's mandate to encourage the deployment of advanced telecommunications capability to all Americans" by "encourag[ing] incumbents to offer advanced services to Internet Service Providers at the lowest possible price."[20] The rationale underlying the Commission's action was that "consumers would . . . benefit through lower prices and greater and more expeditious access to innovative, diverse broadband applications by multiple providers of advanced services" if incumbent LECs could offer ISPs volume and term discounts without having to make such discounted offerings available to resale carriers at the additional discounted rates required by Section 251(c)(4).[21] Isolating xDSL-based advanced services offerings designed for use by ISPs as input components to their Internet access service was deemed acceptable because the incumbent LEC would still have to make available for Section 251(c)(4) resale xDSL-based advanced services provided to residential and business end-users.[22] As the Commission explained, this latter holding "reinforce[d] the resale requirement of the Act by ensuring that resellers are able to acquire advanced services sold by incumbent LECs to residential and business end-users at wholesale rates, thus ensuring that competitive carriers are able to enter the advanced services market by providing consumers the same quality service offerings provided

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[20] In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Services (Second Report and Order), 14 FCC Rcd. 19237 at ¶ 20.

[21] Id.

[22] Id. at ¶ 19.

by incumbent LECs."[23]

SWBT's machinations render this essential predicate false. If an incumbent LEC can limit its provision of xDSL-based advanced services exclusively to offerings designed for ISPs or can unilaterally convert its retail xDSL-based advanced services into an information service not subject to Section 251(c)(4) resale, then the Commission will not have "ensur[ed] that competitive carriers are able to enter the advanced services market by providing consumers the same quality service offerings provided by incumbent LECs."[24] To the contrary, the Commission would have ensured that resale carriers are precluded from providing xDSL-based advanced services in competition with incumbent LECs. To avoid this anti-competitive result, the Commission must make clear that a precondition to the exemption from Section 251(c)(4) resale afforded offerings designed for ISPs is the provision of resold xDSL-based advanced services offerings which can be obtained at statutory discounts for resale to both residential and business consumers.

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[23] Id. at ¶ 20.

[24] Id.

The second of SWBT's twin stratagems to avoid Section 251(c)(4) resale of xDSL-based advanced services involve the Commission's determination that Internet access services provided by ISPs are "information services" not subject to the discounted resale obligations of Section 251(c)(4). The Commission opted to "maintain[] the non-carrier status of Internet service providers" while confirming the applicability of Section 251(c)(4) to xDSL-based advanced services because it perceived such continuity would "benefit[] the public interest."[25] The Commission elected to continue to exempt Internet access service from carrier regulation as a means of enhancing "the level of competition, innovation, investment, and growth in the enhanced service industry over the past two decades."[26] In so doing, however, the Commission made clear that this regulatory scheme would only work if "the underlying market for provision of transmission facilities . . . is subject to sufficient pro-competitive safeguards."[27] Section 251(c)(4) is one of the "pro-competitive safeguards" mandated by Congress to ensure that "the underlying market for provision of

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[25] Id.

[26] Federal-State Joint Board on Universal Service (Report to Congress), 13 FCC Rcd 11501, ¶ 95 (1998).

[27] Id.

transmission facilities is competitive."[28] And the Commission has already found that an incumbent LEC's failure to provide for Section 251(c)(4) resale "severely hinders the ability of other carriers to compete."[29]

[28] Id.

[29] Application of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Service in Connecticut (Memorandum Opinion and Order), CC Docket No. 01-100, FCC 01-208 at ¶ 32.

The underlying flaw in SWBT's argument, accordingly, is that SWBT or an affiliate is the provider of the underlying transmission facilities through which its high-speed Internet access service is provided. SWBT cannot avoid the Section 251(c)(4) obligations that apply to these facilities and the services provided thereover simply by bundling them with an information service. As the Commission explained, "[c]ompanies that are in the business of offering basic interstate telecommunications functionality to end users are 'telecommunications carriers,' and therefor are covered under the relevant provisions of sections 251 and 254 of the Act."[30] "These rules apply regardless of the underlying technology those service providers employ, and *regardless of the applications that ride on top of their services*."[31] In other words, while SWBT is not required to provide for discounted resale of its Internet access service, it may not avoid its Section 251(c)(4) obligations as they relate to the xDSL-based advanced services it uses to provide high-speed Internet access service.

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[30] Federal-State Joint Board on Universal Service (Report to Congress), 13 FCC Rcd 11501, ¶ 105.

[31] Id. (emphasis added).

As ASCENT noted at the outset, SWBT has yet to provide for the meaningful resale of xDSL-based advanced services six years following enactment of the Telecommunications Act of 1996. If the Commission were to sanction SWBT's current ham-handed effort to avoid its Section 251(c)(4) resale of xDSL-based advanced services, there never will be any meaningful resale of such services by SWBT or any other incumbent LEC. Every other incumbent LEC will happily jump on the SWBT bandwagon as they have with each new rationale offered by one or another of the incumbent LECs for avoiding Section 251(c)(4) resale of xDSL-based advanced services. Given that the Commission has confirmed the importance of Section 251(c)(4) resale of xDSL-based advanced services as a means of "ensuring that competitive carriers are able to enter the advanced services market by providing to consumers the same quality service offerings provided by incumbent LECs,"[32] it cannot now lawfully act to effectively eliminate discounted resale of such services. As the Commission has acknowledged, such an action would " "severely hinders the ability of other carriers to compete."[33]

The solution is manifest. SWBT does not need to offer for Section 251(c)(4) resale xDSL-based advanced service offerings truly designed for use by non-affiliated ISPs. Nor does SWBT need to offer for Section 251(c)(4) resale Internet access service provided by either it or its

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[32] In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Services (Second Report and Order), 14 FCC Rcd. 19237 at ¶ 20.

[33] Application of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Service in Connecticut (Memorandum Opinion and Order), CC Docket No. 01-100, FCC 01-208 at ¶ 32. The Commission should ask itself why incumbent LECs have gone to such extraordinary lengths to avoid Section 251(c)(4) resale of xDSL-based advanced services. It may be that the incumbents have long known that resale of such services, particularly when coupled with the UNE-Platform, is the only viable means for competitors to enter the advanced services market in the near-term, an assessment that appears to have been confirmed by the multiple business failures of data LECs, including the likes of Northpoint and RythmsNet.

affiliates to end users. In order for these statements to hold true, however, SWBT must make available for Section 251(c)(4) resale on a non-volume/non-term basis the same array of xDSL-based advanced service offerings it utilizes to provide its Internet access service and that it provides on a wholesale basis to ISPs.

4. SWBT Should Not be Afforded Any Additional In-region, InterLATA Authority Until the Commission Has Completed Its Investigation of the Misrepresentations SWBT Used to Secure Such Authority in Kansas and Oklahoma

SWBT has acknowledged that its application to originate interLATA traffic in the States of Kansas and Oklahoma contained false and misleading information.[34] The Commission's decision to grant SWBT the authority it sought therein was predicated in part on these misrepresentations.[35] While the Commission has represented to the U.S. Court of Appeals for the District of Columbia Circuit in the multiple appeals of that decision that it is "investigating the circumstances surrounding" SWBT's conduct, it has not yet finalized its inquiry. Until such time as the Commission has completed its investigation, SWBT should not, indeed, cannot, be afforded

[34] Letter from Edwardo Rodriguez, Jr., Director, Federal Regulatory, SBC Communications Inc., to Magalie Roman Salas, Secretary, Federal Communications Commission, filed April 13, 2001, in CC Docket No. 00-217 ("Rodriguez Letter").

[35] Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Service in Kansas and Oklahoma (Memorandum Opinion and Order), 16 FCC Rcd 6237, ¶ 129 (2001) (*subsequent history omitted*).

any additional authority under Section 271.

By way of brief background, SWBT's competitive checklist compliance in the States of Kansas and Oklahoma had been challenged on the grounds that the carrier "fail[ed] to return information on copper loops when end users are served by fiber (*e.g.*, where SWBT has deployed fiber to remote terminals under its 'Project Pronto')."[36] It was pointed out that "[i]n such circumstances . . . SWBT return[ed] information on characteristics of the loop served by the digital loop carrier that may be the 'best' loop to a given end user but which is incompatible with the competing carrier's service." The Commission acknowledged that if this were indeed the case, "this practice . . . would appear to violate the *UNE Remand Order.*"[37] But, the Commission denied the aforesaid challenge, finding that SWBT had "satisfactorily answered" the objections, and therefore, had "satisfie[d] the requirements of the *UNE Remand Order* and this checklist item."[38] As noted by the Commission, SWBT had explained that in the circumstance described above, "its systems

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[36] Id.

[37] Id.

[38] Id.

would automatically return loop make-up information on the fiber loop," and clarified that "it instruct[ed] its engineers who perform manual look-ups to return information on an all-copper loop in those situations where the end user is served by both a digital loop carrier and the copper loop."[39]

[39] Id.

More than a month after its Kansas/Oklahoma Section 271 application was granted, SWBT "learned of the possibility that the descriptions of how SWBT's Loop Qualification system obtained actual loop makeup information from [the Loop Facilities Assignment and Control System ("LFACS")] might contain some inaccuracies."[40] After another month passed, SWBT advised the Commission that information provided in response to challenges that the loop qualification data it provided to competitive LECs did not comply with Commission requirements was indeed "inaccurate," and that contrary to its declarations otherwise, that it did filter the loop makeup information it returned to competitive LECs.[41] As euphemistically explained by SWBT, "LFACS will not always return actual loop makeup information on an available non-loaded copper loop as if it were provisioning a DSL-capable loop to the address for which loop makeup information is requested."[42]

While SWBT attributes its submission of "inaccurate" information to "SWBT personnel who . . . were mistaken in their understanding of how LFACS works,"[43] the carrier and its corporate parent have previously been sanctioned by the Commission and state regulators for seemingly comparable misconduct. Thus, the Commission has previously investigated SBC Communications Inc. ("SBC") for making "inaccurate statements" to the Commission in conjunction with its acquisition of Southern New England Telephone Company, entering into a Consent Decree with SBC which required it, among other things, to make a payment of $1,300,000 to the U.S.

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40 Rodriguez Letter at 3.

41 Id.

42 Id.

43 Id.

Treasury.[44] And the Texas Public Utilities Commission ("Texas PUC") has sanctioned SWBC for serious discovery abuses involving its failure to produce essential documents and witnesses.[45] In each instance, SWBT and/or SBC have claimed inadvertence, which casts doubt on the credibility of the carrier's claim of inadvertence with respect to the "inaccurate" information it filed in support of its Kansas/Oklahoma Section 271 application..

[44] SBC Communications Inc., 14 FCC Rcd. 12741 (1999).

[45] Petition of Accelerated Communications, Inc. (Order on Appeal of Order No. 20), Docket Nos. 20272 and 20226 (Texas PUC October 13, 1999).

As the Commission has made clear in other circumstances, "false or misleading submissions can have serious implications," including revocation of previously-granted authority, forfeitures and referrals to the U.S. Department of Justice for violation of 18 U.S.C. §1001.[46] While revocations and monetary penalties cannot be imposed until after the Commission concludes its investigation of SWBT's conduct, neither can the carrier be awarded subsequent Section 271 authority until that time. SWBT has conceded that it obtained its Kansas/Oklahoma Section 271 authority through the use of false and misleading information. In other words, the carrier has authority to originate interLATA traffic in two states which it should not have. Granting SWBT additional authority in Arkansas and Missouri would be akin to giving the carrier license to deceive.

5. SWBT has Not Adequately Addressed the Concerns Identified by the U.S. Department of Justice Regarding Its Pricing of Unbundled Network Elements in Missouri

[46] Quatron Communications, Inc., 15 FCC Rcd. 4749, ¶ 17 (2000).

In its evaluation of SWBT's initial application to originate interLATA traffic in Missouri, the U.S. Department of Justice ("Department") raised serious questions regarding the levels at which SWBT had set rates for unbundled network elements ("UNEs"), and the methods and inputs used to calculate those rates.[47] Specifically, the Department highlighted the significant disparities between the recurring switch and loop rates set in the *First Arbitration Order*[48] and the switch and loop rates charged by SWBT in Texas and Kansas, and the various recurring charges established in the *Second Arbitration Order*[49] and comparable rates assessed by SWBT in Texas, Kansas and Oklahoma, none of which disparities were adequately justified by cost differences among the states.[50] Rather, the Department attributed the disparities to a variety of potential methodological and input errors, including reliance upon inadequate "switch discounts," inaccurate "hardware factors," "aggressively short asset lives," and erroneous common cost allocations.[51] These methodological and input errors, the Department continued, were exacerbated by excessive reliance by SWBT on interim rates.[52]

SWBT has done little to address these concerns. While the carrier has reduced non-

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[47] Evaluation of the United State Department of Justice filed in CC Docket No. 01-88 on May 9, 2001 at 7 - 20 ("DOJ Evaluation").

[48] AT&T Communications of the Southwest, Inc.'s Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 (Final Arbitration Order), Case No. TO-97-40 (Missouri PSC July 31, 1997).

[49] AT&T Communications of the Southwest, Inc.'s Petition for Second Compulsory Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 (Final Arbitration Order), Case No. TO-98-115 (Missouri PSC December 23, 1997).

[50] Id. at 13.

[51] Id. at 14 - 19.

[52] Id. at 19.

recurring charges developed in the *First Arbitration Order* and *Second Arbitration Order* by up to 25 percent, recurring charges remain virtually unchanged.[53] As such SWBT's Missouri recurring charges continue to exceed rates in other states by substantial margins. Switching rates are particularly problematic, exceeding switching charges levied by SWBT in Texas and Kansas by 22 to 60 percent. And recurring rates set in the *Second Arbitration Order* continue to exceed comparable rates in Texas, Kansas and Oklahoma by two to six times. Yet the costs in Missouri and Kansas are nearly identical and what cost differences exist between Missouri and Texas and

Oklahoma are no where near large enough to explain the significantly higher rates charged by SWBT in Missouri.

[53] Brief in Support of Joint Application at 23 - 30.

Nor has SWBT adequately addressed the methodological and input concerns raised by the Department. For example, SWBT justifies its high depreciation costs by arguing that reference must be to economic, rather than physical, obsolescence, asserting that the former justifies use of extremely short asset lives.[54] To achieve this end, however, SWBT utilized financial depreciation lives which overstate depreciation costs because they are primarily designed to protect shareholders, rather than to reflect forward-looking economic depreciation lives. Another example is SWBT's justification of its common cost allocation factor as "on the low end of states within SBC's region" and properly predicated on "total revenues as opposed to total expenses."[55] Yet SWBT's Missouri allocation factor exceeds the factor the carrier applies in Kansas by sixty percent and in Texas by thirty percent, and is overstated because return on investment is not reflected in total costs, yet the factor is applied to costs that include a return on forward-looking investment.

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[54] Id. at 32 - 33.

[55] Id. at 34 - 35.

SWBT's defense of its use of a forty percent "fill factor" is no more compelling. The carrier asserts that because the Commission "did not reject a 40 percent fill factor in the *Massachusetts Order* . . . there is no basis for rejecting the [Missouri Commission's] conclusion on this issue."[56] While the Commission tolerated a forty percent fill factor in approving Verizon's Massachusetts Section 271 application, it did so solely because "the errors made by the Massachusetts Department in establishing loop rates were not so great as to render the resulting rates outside the range that a reasonable application of TELRIC principles would produce."[57] Moreover, the Commission noted with approval fill factors of fifty percent or greater, including fill factors in Kansas and Texas of fifty-three percent and fifty percent, respectively.[58]

Likewise, SWBT's defense of its "switch discounts" and "hardware factor" is lacking. With respect to the former, the carrier relies principally on upward adjustments made by the Missouri Public Service Commission ("Missouri PSC") in the carrier's originally proposed discounts, and the Commission's willingness to defer to the New York Public Service Commission with respect to this matter.[59] As noted by the Department, however, the Missouri PSC computed its switch discounts based on expansion of SWBT's existing network, rather than on a new forward-looking network, in clear violation of Commission mandates.[60] The result, as predicted by the

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[56] Id. at 37.

[57] Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), and Verizon Global Networks, Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts, CC Docket No. 01-9, FCC 01-130, ¶¶ 39 - 40 (April 16, 2000).

[58] Id. at 39

[59] Brief in Support of Joint Application at 39 - 41.

[60] DOJ Evaluation at 14 - 15.

Commission in its order approving Verizon's Massachusetts Section 271 application, are "prices outside the reasonable range of what TELRIC would produce."[61] As to its "hardware factor", SWBT again relies principally on the evaluation of the Missouri PSC. Yet the Missouri PSC staff specifically noted that SWBT's factor appeared to reflect old technology, as well as double counting of maintenance port costs.

[61] Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), and Verizon Global Networks, Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts, CC Docket No. 01-9, FCC 01-130 at ¶ 251.

Finally, SWBT's principal response to the concerns expressed by the Department with regard to the large number of interim rates the carrier continues to assess is that because a number of these interim rates are set at zero, competitive LECs are the beneficiaries of their interim state.[62] The Department's assessment is far more critical. Thus, the Department notes that "SBC's Missouri Section 271 application is predicated upon a large number of rates that have remained interim for a long time, a number of which are "troublingly high."[63]

In short, the UNE pricing concerns voiced by the Department with respect to SWBT's initial Missouri Section 271 application remain largely unaddressed and continue to be highly problematic.

6. Conclusion

By reason of the foregoing, the Association of Communications Enterprises urges the Commission to deny as premature the Joint Application of SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for authority to originate interLATA traffic in the States of Arkansas and

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62 Brief in Support of Joint Application at 43 - 44.

63 DOJ Evaluation at 19.

Missouri, and to require, as mandated by Section 271(d)(3) of the Act, full compliance with the competitive checklist before SWBT is granted such authority.

Respectfully submitted,

ASSOCIATION OF COMMUNICATIONS ENTERPRISES

By: /s/

Charles C. Hunter
Catherine M. Hannan
HUNTER COMMUNICATIONS LAW GROUP
1424 16th Street, N.W.
Suite 105
Washington, D.C. 20006
(202) 293-2500

September 10, 2001

Its Attorneys

CERTIFICATE OF SERVICE

I, Charles C. Hunter, do hereby certify that a true and correct copy of the foregoing document was served by first class mail, postage prepaid, on the individuals list on this 10th day of September, 2001:

John P. Bethel
Executive Director
Arkansas Public Service Commission
1000 Center Street
Little Rock, Arkansas 72203

Brian Kinkade
Executive Director
Missouri Public Service Commission
Governor Office Building
200 Madison Street
P.O. Box 360
Jefferson City, Missouri 65102-0360

Laury E. Bobbish
U.S. Department of Justice
Telecommunications Task Force
Antitrust Division
1401 H Street, N.W.
Suite 8000
Washington, DC 20530

Paul G. Lane
Southwestern Bell Telephone Company
One Bell Center
Room 3520
St. Louis, Missouri 63101

Cynthia Barton
Southwestern Bell Telephone Company
1111 West Capitol
Room 1005
Little Rock, Arkansas 72203

Michael K. Kellogg
Geoffrey M. Klineberg
Colin S. Stretch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1615 M. Street, N.W.
Suite 400
Washington, DC 20036

Alfred G. Richter, Jr.
Southwestern Bell Telephone Company
175 E. Houston
Room 1250
San Antonio, Texas 78205

James D. Ellis
Paul K. Mancini
Martin E. Grambow
Kelly M. Murray
Robert J. Gryzmala
John S. DiBene
John M. Lambros
SBC Communications, Inc.
175 E. Houston
San Antonio, Texas 78205

/s/

Charles C. Hunter